In The

Supreme Court of the United States

October Term, 1976

No. 76-1542

ELLIOT LASKY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Preliminary Statement

Petitioner is a law school graduate whose first trial on a federal drug charge ended in a hung jury. In his second trial the prosecution produced a new witness, David Stutler, who was serving a three-year term for a cocaine smuggling conviction. He was allowed to testify about petitioner's involvement in another drug importation incident, not covered by the indictment, on a "similar acts" theory.

Under cross-examination Stutler denied engaging in any other smuggling trips. In truth, the United States Attorney knew Stutler had smuggled over 700 pounds of marijuana into the United States on two previous occasions and was never prosecuted. Defense counsel had specifically requested this information in advance of trial.

Petitioner was convicted and sentenced to seven years in prison. Thereafter, Stutler's sentence was modified to time served, on the government's recommendation, and he was immediately released from prison. In a few words, that is what this case is all about except to say that the judgment below, approving this form of prosecutorial malfeasance, raises the gravest constitutional doubts. The awful spectre of prosecutorial misconduct continues to stalk across the pages of this Court's opinions and must be halted. A grant of certiorari in this case will help achieve that objective.

Table of Cases

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Petitioner, ELLIOT LASKY, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on January 5, 1977.

Opinion Below

The opinion of the Court of Appeals dated January 5, 1977 is reported, *United States v. Lasky*, 548 F.2d 835 (9th Cir. 1977), and is printed in Appendix A, *infra*, at p. A-1 *et seq.*

Jurisdiction

Following a jury trial, petitioner was found guilty in the United States District Court for the Southern District of California of importing and conspiracy to import cocaine in violation of 21 U.S.C. §§952, 960 and 963. On July 18, 1975, the petitioner was sentenced to two concurrent seven-year terms in prison with a ten-year special parole term.

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit and subsequently moved for a new trial on the ground of newly discovered evidence. The Ninth Circuit remanded the case to the district court to review the new evidence claim.

After a hearing, the district court declined to entertain the motion for a new trial, and petitioner appealed the ruling to the Ninth Circuit. The appeals were then consolidated, and on January 5, 1977, the circuit court affirmed appellant's conviction. An application for rehearing was denied on March 8, 1977.

This petition for a writ of certiorari is filed within sixty days of the denial of the rehearing, an extension of time having been granted by Mr. Justice Rehnquist in an Order dated April 6, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional Provision Involved

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes Involved

Sections 952, 960, and 963 of Title 21 of the United States Code, because of their length, are reprinted in Appendix B, *infra*, at p. B-1 *et seq*.

Questions Presented

1. Whether petitioner's conviction can be constitutionally sustained where a federal prosecutor deliberately suppresses critical evidence, specifically requested by defense counsel, which would have discredited the prosecution's chief witness.

2. Whether an error of due process proportion was committed by the trial court in permitting the chief prosecution witnesses to testify to separate transactions that occurred as long as one year after the incident for which petitioner was indicted, tried, and convicted.

Statement of Facts

The petitioner is an aspiring lawyer, having graduated with honors from the University of Buffalo Law School in 1975. He was convicted in the Southern District of California of importing and conspiring to import cocaine, involving an episode that occurred in the fall of 1971, and was sentenced to serve a seven-year term of imprisonment. That simple statement suggests the awful solemnity of the occasion that brings us to this Court.

In October of 1971, petitioner, while in California to purchase inventory for a part-time waterbed business conducted in Buffalo, met a Claudia Edman (later, Mangiameli) for the

purpose of buying a small amount of cocaine (RT-558).* Miss Edman had recently returned from Columbia with eight ounces of cocaine (RT-558). Petitioner declined to purchase any cocaine, but discussed with her a Thomas Saytes, who was expected to travel to Columbia to import various handicrafts. Petitioner had met with Saytes to discuss the possible resale of the handicraft imports in the United States (RT-876). Petitioner gave Saytes the names of three friends of his in Columbia so the latter would have people to socialize with while in Columbia (RT-876, 878, 881).

Later that year Saytes traveled to Columbia, where he met Claudia Mangiameli and her husband, where they purchased cocaine, in conjunction with five other Californians, which was then smuggled into the United States in the spare tire of an automobile. The car was searched at the Mexican border and the cocaine was discovered. The Mangiamelis and Saytes pleaded guilty to the charges of importing cocaine and then agreed to testify against the petitioner and others. The government's only proof against petitioner came from the tainted testimony of Thomas Saytes and Helen Smith.

Saytes is a heroin addict and an admitted perjurer and disliked petitioner. He testified that the petitioner gave him the list of Columbia cocaine contacts (the friends in Columbia) and the purchase money. He told about the purchase and importation of cocaine. Saytes also testified about three subsequent similar transactions involving Lasky over defense counsel's strenuous objection. All these facts of the petitioner's defense, as filtered through the Circuit Court of Appeals, can be related briefly from that opinion:

> "Lasky admitted his involvement in the May 1972 transaction, but denied any involvement in the January 1972 or December 1972 transactions. In his own defense

*Refers to pages of transcript filed in United States Court of Appeals for the Ninth Circuit.

> Lasky testified that he met with Claudia Mangiameli to purchase cocaine for personal use and not to discuss importing cocaine. He asserted that he was not involved in the conspiracy and that Saytes was acting independently and not as his agent. Lasky testified that the names he gave Saytes were social contacts. He explained his attendance at the Los Angeles meeting as a response to a friend's (Saytes) plea for help.
>
> "The other defense witnesses' testimony supported Lasky's and undermined Saytes' credibility. They testified that Saytes' reputation for truth and veracity was poor, that he was a heroin addict, and that Saytes had a misunderstanding with Lasky because of Claudia Mangiameli's comment that Lasky considered Saytes 'a mere lackey.' They testified that when confronted by Saytes, Lasky denied making the statement and accused Claudia of a fabrication" (548 F.2d at 838).

Based upon this highly dubious proof, petitioner's first trial understandably ended in a hung jury. At the second trial, the government produced up one David Stutler, who had been convicted of smuggling 22½ pounds of cocaine into the United States and was serving a three-year term of imprisonment.*

David Stutler, who appeared to be the "cleanest" of the prosecution's witnesses, testified to a similar transaction which occurred in December of 1972. He said that he flew what he thought to be a trial cocaine run to Mexico for one Fred Chase. Later, at a dinner party, he claimed that it was not "a dry run" but a successful run. Stutler testified that at the party Lasky gave Fred Chase an envelope from which Chase later paid Stutler for piloting the aircraft (548 F.2d at 838). Stutler admitted that he had been convicted of importing the cocaine and

*In the first trial the government offered Stutler's testimony but the trial justice refused to receive it because of its prejudicial nature and remoteness. However, in the second trial the judge permitted this highly questionable proof over defense counsel's objection.

was presently serving a prison sentence for that offense. On cross-examination, petitioner's attorney questioned Stutler about any other trips he made besides the cocaine ventures.*

Stutler denied any other smuggling trips. At the time Stutler gave this false testimony, the Assistant United States Attorney knew that the witness had made two other trips to import marijuana in addition to the two cocaine trips. Nevertheless, the government deliberately waited for six days before disclosing this crucial information to the court and only then after the jury was in its second day of deliberation. Also petitioner's trial counsel had just left the jurisdiction to fulfill another commitment and a young assistant was acting in his place. Substitute counsel immediately insisted that the jury be made aware of this impeaching evidence. However, before agreement could be reached about how the information should be transmitted to the jury, a guilty verdict was reached and reported.

One week after petitioner was sentenced to seven years imprisonment, David Stutler's sentence was modified to time

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* "Q. And the trial in which Mr. Coffin asked you about was a trial where you attempted to smuggle twenty-two and a half pounds of cocaine into the United States. Is that right?

A. That's right.

Q. And you were arrested in — on an island near Columbia. Is that right?

A. Yes, that is right.

Q. And as a result of that arrest and the cocaine that was found in your airplane, you went to trial here in San Diego. Is that right?

A. Yes.

Q. How many other trips have you made besides that one?

A. The one that I am presently incarcerated on?

Q. Yes.

A. The one in question here, in 1972.

Q. So you only made two trips?

A. Yes" (548 F.2d at 839).

served and he was immediately released over the probation department's objection. Thomas Coffin, the Assistant United States Attorney in this case, requested that he be released from custody.*

On January 30, 1976 petitioner's counsel learned that Fred Chase, a co-conspirator in the instant case and an alleged co-conspirator of David Stutler, gave a signed statement to Mr. Coffin indicating that Stutler had lied on the witness stand in the petitioner's trial.**

**See* Transcript and proceedings in *United States v. David Stutler*, No. 15682, August 25, 1975.

***See* affidavit of Philip Ryan submitted in support of motion for new trial in district court.

REASONS FOR GRANTING THE WRIT

I.

Petitioner's conviction cannot be constitutionally sustained where a federal prosecutor deliberately suppresses critical evidence, specifically requested by defense counsel, which would have discredited the prosecution's chief witness.

Seldom has there been so shocking a conviction of an upstanding young man based upon the most infamous form of prosecutorial deceit. The Ninth Circuit grievously misconstrued this Court's decision in *Agurs* and concluded that the evidence suppressed by the prosecution, so vital to the petitioner's defense, "would not create a reasonable doubt that did not otherwise exist" (548 F.2d at 840). Consequently, the lower court's decision is in direct defiance of the regime of *Brady-Giglio-Agurs* and is so serious a threat to the continuing vitality of that range of law as to require immediate corrective action by this Court.*

The primary question we bring to this Court is whether petitioner's conviction can be constitutionally sustained where the prosecution deliberately and knowingly suppressed crucial evidence bearing indirectly on the credibility of the government's chief witness. The resolution of this significant question is desperately needed in order to maintain the integrity of this important rule of law so crucial to the defense of criminal cases in this country.

In 1963 this Court gave birth to the *Brady* doctrine by holding, in a constitutionally triumphant decision, that the

**United States v. Agurs,* U.S. , 96 S.Ct. 2392 (1976); *Giglio v. United States,* 405 U.S. 150 (1972); *Brady v. Maryland,* 373 U.S. 83 (1963).*

prosecution's suppression of evidence favorable to an accused and material to either guilt or punishment, violates the due process clause irrespective of the prosecution's good faith. The principal impulse for the *Brady* rule grew out of this Court's recognition that law enforcement officers are duty bound to conduct impartial investigations and are obliged to share with the defense evidence favorable to the latter's cause.

A decade later, in *Giglio v. United States,* 405 U.S. 150 (1972), the Court expanded the frontiers of *Brady* by bringing within its territorial limits the principle that a state cannot stand by and permit perjured testimony to go uncorrected. Thus, under *Giglio* the standard for awarding a new trial is whether there is any reasonable likelihood that the disclosure would have *affected* the jury's judgment. The co-existence of *Brady* and *Giglio* spawned a mass of authority which eventually reached unmanageable proportions. Thus, this past year, the court undertook to formulate more definitive standards for measuring the legal consequences flowing from *Brady-Giglio* failures.

In *United States v. Agurs,* U.S. , 96 S.Ct. 2392 (1976), the Court refined the contours of the *Brady* doctrine by classifying the various forms of prosecutorial malfeasance, relating to the nondisclosure of evidence favorable to the defense in a criminal prosecution, in the following manner:

(1) The prosecution's use of perjured testimony;

(2) The prosecution's failure to disclose favorable evidence specifically requested by the defense; and

(3) The prosecution's failure to disclose favorable evidence when the defense makes no request or a general one.

In the first situation, a new trial must be granted "if there is any reasonable likelihood that the false testimony could have *affected* the judgment of the jury" (96 S.Ct. at 2397; emphasis supplied). This stricter standard is applicable because the truth-

seeking function of the jury is compromised and prosecutorial misconduct is present.*

This Court has repeatedly held that critical impeachment evidence may play a large role in determining the outcome of a trial. *Giglio v. United States*, 405 U.S. 150 (1972); *Giles v. Maryland*, 386 U.S. 66 (1967); *Napue v. Illinois*, 360 U.S. 264 (1959). *See* Comment, "Materiality and Defense Requests: Aids in Defining the Prosecutor's Duty of Disclosure," 59 *Iowa L. Rev.* 433, 438 (1973).

The Ninth Circuit became preoccupied with defense counsel's request, mislabeled "general," for evidence ultimately subverted by the prosecution. In fact, defense counsel's demand was really quite specific as pointed out later in the petition. However, more important, the Court of Appeals overlooked the prosecution's use of perjured testimony resulting in prosecutorial misconduct of the worst kind. Thus, the application of the first branch of the *Agurs* standard of materiality should apply, requiring a new finding that there was a "reasonable likelihood" that the false testimony could have "*affected* the judgment of the jury" (96 S.Ct. at 2397; emphasis supplied). Instead, the Ninth Circuit imposed the reasonable doubt test which is contrary to *Agurs'* mandate. This dangerous

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* In the other situations, not relevant here, constitutional error is committed only when a reasonable doubt of guilt is created where otherwise none existed (96 S.Ct. at 2401). *Agurs* established a less stringent test to be applied when the defense requests specific evidence. In that situation, if there is "a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge" (96 S.Ct. at 2399).

Agurs must be viewed as a "discovery" case. Neither a promise of leniency nor perjured testimony was involved. Instead, there was the rather typical contention that the government possessed information unknown to the defense which it should have divulged. Since there was no prosecutorial misconduct and no reason to question the veracity of any of the prosecution's witnesses, the test of any reasonable likelihood that the jury verdict could have been affected was not applicable.

ruling is not only erroneous and largely unworkable but constitutes a terrible threat to the vitality of the *Agurs* doctrine. Gauged by the *Agurs* criteria, petitioner was clearly entitled to a new trial.

The questions left unanswered by *Agurs*, posed by this petition, involve the deliberate concealment of highly relevant evidence which was also specifically sought in advance of trial. Thus, this case carries the Court into new territory. Petitioner's counsel specifically sought to learn before trial whether any of the government witnesses were involved in any other illicit transactions or whether they were afforded special considerations in exchange for their testimony.* It requires no gift of prophecy to perceive that the defense was clearly seeking material that would provide a basis for a claim of prosecutorial favoritism or preferential treatment of government witnesses.

Clearly, David Stutler was the premier witness against petitoner. Without him, the jury in the first trial was unconvinced of petitioner's guilt. He was the "cleanest" appearing of the government witnesses and was serving a prison term for the two cocaine trips disclosed in his direct testimony. Thus the jury was left with the erroneous impression that he was paying his debt to society for these transgressions and had no motive to lie. In other words, the jury was falsely led to believe that Stutler was motivated only by conscience and that there was no

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*Specifically, counsel alleged in his Omnibus Motion:

> "[Defendant] . . . believes that many of the witnesses that will be testifying on behalf of the prosecution in this case, several of whom may be key government witnesses, were made promises by the prosecution, that by cooperating with the government, they might receive certain benefits such as reduced sentence, probation, *recommendations to the Court for early release and agreements not to prosecute*" (T-63; emphasis supplied).

Defense counsel requested in open court that he wanted to know whether the individuals who were testifying as witnesses were involved in any other illicit transactions (RT-36).

deal made when, in truth, it is highly likely he was responding to the government's promises that he would not be prosecuted for the other two smuggling trips.

At the very moment Stutler denied his involvement in any other smuggling trips, the United States attorney knew he was lying.* The prosecutor knew that Stutler, on two other occasions, had unlawfully imported 700 pounds of marijuana into the United States. But instead of disclosing that crucial information, the prosecutor chose to "stonewall it" and suppress the evidence.

The whole thrust of petitioner's defense was that the prosecution's testimony was shaped by self-interest. The knowledge of these other two marijuana trips would have probably opened up other obvious avenues of inquiry into the relationship of the witness with the prosecution from the outset of the case. Cross-examination of Stutler would have been highly more profitable with the valuable information of the other two unprosecuted smuggling trips. Indeed, all that was needed for an acquittal was for the jury to doubt Stutler's testimony because of his obvious motive to lie. Instead, the jury was left with the impression that Stutler, having admitted his two cocaine trips, was being punished for those miscalculations and had no reason to speak falsely. Had they known about his two additional smuggling flights, involving illegal importation of over 700 pounds of marijuana, they would have surely considered more seriously his apprehension that he would be prosecuted for those offenses if he did not say what the government urged.

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*The Court of Appeals concluded:

> "The Assistant United States Attorney knew at the time of Stutler's testimony that Stutler had made two trips to import marijuana in addition to the two cocaine trips" (548 F.2d at 839).

More importantly, a promise of leniency, without a definite commitment, may be interpreted by the recipient as contingent upon the quality of the testimony given. The more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor. In short, as in *Napue* and *Giglio*, the prosecution created a false impression at trial, when the truth would have directly impugned the veracity of its witness.

Furthermore, the false denial by Stutler on the witness stand of these two separate trips has a more serious bearing than the government is willing to admit. In this respect, it cannot be said to constitute merely cumulative impeaching material. His answer, on cross-examination, that he only made two trips involving cocaine was consciously untruthful. Whereas his other answers, acknowledging his guilt in the cocaine cases, albeit unfavorable to him, could be cited in defense of his honesty as a witness.

The government's case against the petitioner was such that Stutler's credibility was *the* decisive factor. Without his testimony in the first trial they could not convict petitioner. Stutler's unimpeached testimony in the second trial turned the tide. Thus, the conclusion is irresistible that the disclosure of his conscious concealment of these other smuggling trips would have generated a serious doubt concerning the rest of the evidence he delivered against the petitioner.* Unquestionably, this crucial proof would have exerted a compelling impact on Stutler's credibility. The jury's knowledge that he had been involved in two other illegal flights, for which he had not been prosecuted, probably would have created sufficient doubt in the minds of enough jurors to either result in an acquittal or another hung jury. Surely, there was "a reasonable likelihood" that the false testimony could have "affected the judgment of the jury." As this Court said so well in *Napue*, "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be

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*See II, *infra*.

determinative of guilt or innocence . . ." (360 U.S. at 269). So it is here, the jury was squarely faced with a hard question of whom to believe — Stutler or the petitioner. By allowing this perjured testimony to go uncorrected, the prosecution's vengeance was etched on the petitioner, an aspiring lawyer whose character was supported by two state Supreme Court justices and a host of other outstanding citizens.*

What lends force to this argument is how uniquely successful Stutler was in achieving these very objectives. Within one month after the petitioner was sentenced, he was a free man having smuggled 22 1/2 pounds of cocaine into the United States and 700 pounds of marijuana. Whereas the petitioner will be forced to serve seven years in prison for allegedly conspiring to import a much smaller amount of cocaine into the United States.

The government tries to rid itself of this "damned spot" by arguing that Stutler did not testify falsely when he stated that he had made only two trips in connection with smuggling because defense counsel's inquiry was ambiguous. In short, the government maintains that, notwithstanding the fact that Stutler and the government knew of at least two other smuggling ventures involving marijuana, the witness might have interpreted the question as relating strictly to cocaine. This claim must be viewed suspiciously since the prosecution waited for six whole days and after the jury's deliberations had commenced, before divulging this vital information. Certainly, this critical error then became the turning point of the case and such a gross constitutional default is unredeemed by the prosecution's belated (and perhaps strategically planned) *mea culpa*.

*See Sentencing Memorandum presented to the Honorable William B. Enright on July 17, 1975.

Moreover, since the trial court did not order the witness to be recalled, we will never know how he interpreted the question. In any event, the jury's impression of David Stutler was markedly different from what it would have been had they known he was an experienced, highly active smuggler. One need not engage in the semantics of trial counsel's questions nor speculate on Stutler's understanding of them. One fact remains immutably fixed in these proceedings: the Lasky jury received a grotesquely false picture of David Stutler. The jury was deprived of substantial probative facts in a delicate and close lawsuit deciding a young man's life and liberty. Without this crucial proof, all hope of a just verdict was lost.

Apparently prosecutors in this country are continuing to court calamity by their brazen failures to comply with the *Brady* rule. Courts must hold prosecutors to their duty of conducting themselves in a responsible fashion, rather than as advocates privileged to win their cases by any means available. A prosecutor's responsibility to a defendant is no less than the duty owed to any other member of society, for the investigation of crime should be designed not only to convict the guilty but to free the innocent.

Integrity is the lifeline of our criminal justice system. When it is broken, our government is jeopardized. When those charged with upholding and enforcing the law engage in deceit, our whole system is imperiled. This form of dishonesty, if allowed to spread, will devour our system of justice like a sickle-cell anemia. It eats away at the vitals of our Constitution and will inevitably lead us to a garrison society. Judicial warnings are not enough. Prosecutorial misconduct of this magnitude is discouraged only by making these misadventures unprofitable. Only by reversing such overzealous prosecutions can the ardor of prosecutors be kept within the legal limits and justice be secured.

If this Court gives in to the prosecution here, the carefully conceived language of *Agurs* will be converted into a sanctuary for errant prosecutors and further official malfeasance will be sponsored. This case, better than any other, demonstrates why the borders of *Brady* must be constantly patroled by this Court. No higher duty, no more solemn responsibility rests with this Court, than to see that prosecutions are maintained at the very highest level. For all these reasons, the petition for certiorari should be granted.

II.

An error of due process proportion was committed by the trial court in permitting the chief prosecution witnesses to testify to separate transactions that occurred as long as one year after the incident for which petitioner was indicted, tried, and convicted.

One of the most prominent events in petitioner's trial occurred when the government stunned everyone by questioning prosecution witnesses Helen Smith, Thomas Saytes, and David Stutler about incidents involving cocaine, which occurrences took place *subsequent* to the activity for which petitioner was on trial. Acting with more zeal than wisdom, the government made a drastic choice and persisted in pressing this prejudicial proof. The obvious effect of the testimony — as intended by the prosecutor — was to portray petitioner as a man of moral turpitude and one who was deeply involved in the smuggling of narcotics. It is readily apparent that the government was attempting to obscure its scanty proof on the December 1971 conspiracy by placing before the jury evidence of other incidents. The jury easily became confused by the many different dates, places, participants, and activities. The prosecution's smoke screen was unfortunately most effective.

As noted by the Court of Appeals in its opinion:

> "The government also presented evidence of three *subsequent* similar transactions involving Lasky. A January 1972 transaction was related only by Tom Saytes. On this occasion Lasky personally made the arrangements for the couriers. After Lasky gave him the money, Saytes testified, he flew to Columbia, made the purchase and supplied the cocaine to the couriers.
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> "The May 1972 transaction involved Lasky, Saytes and Helen Smith. Lasky provided the financing, Saytes made the purchase and Smith was the courier. Smith was arrested at a New York airport, and subsequently all three pleaded guilty and were convicted.
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> "The third similar transaction occurred in December 1972" (548 F.2d at 838; emphasis supplied).

Petitioner in his own defense testified and admitted his involvement in the May 1972 transaction but denied any involvement in the January 1972 and December 1972 transactions testified to by Saytes and Stutler. In fact, the *only* evidence related by David Stutler concerned the December 1972 transaction in which he described his flying a trial cocaine run to Mexico, which was in reality a successful run. Stutler offered no evidence whatsoever against petitioner as to the December 1971 conspiracy, which was the subject of the indictment. We estimate that more than 50 percent of the proof received against petitioner was concerned with subsequent similar acts.

Clearly, the government elicited the testimony of the unrelated transactions to create prejudice in the jurors' minds. The basic rule, that now requires reinforcement, provides that:

> "[E]vidence of another crime may be introduced if, though only if, it 'is substantially relevant for some other purpose than to show a probability' that the defendant 'committed the crime on trial because he is a man of criminal character'" (*United States v. Bozza*, 365 F.2d 206, 213 [2d Cir. 1966]).

This principle is derived from a desire to shield defendants from the obvious prejudices flowing from a jury's consideration of other illegal acts totally unconnected with the charges included in the indictment.

The subsequent acts to which prosecution witnesses Smith, Saytes, and Stutler testified were in no way part of the transaction for which petitioner was on trial. In point of fact, no one had even been charged with a crime arising out of the January 1972 or December 1972 incidents. Moreover, even if evidence as to subsequent similar acts was admissible on the questions of petitioner's intent and knowledge, Stutler's testimony should have been rejected because it dealt solely with the December 1972 occurrence. That act was far too remote in time to have any probative value on the issues for which it was presumably offered.

Hubby v. United States, 150 F.2d 165 (5th Cir. 1945), was a case where the indictment did not charge a continuing offense but the distinct offenses of concealing and selling drugs. The Fifth Circuit held that evidence of transactions similar to those charged in the indictment, but subsequent thereto, could not be used to strengthen or supplement the evidence adduced to prove the substantive offense.

In the instant case there was only the evidence of Helen Smith and Thomas Saytes in support of the charges in the indictment. Saytes' credibility as a witness had been impugned by other witnesses (548 F.2d at 838). The indictment stated that the conduct for which petitioner was charged ended in December 1971. There was no allegation of a continuing plan or scheme. Therefore, it is apparent that the government illegally sought to strengthen its case by casting doubts upon petitioner's character through the use of the testimony of the subsequent drug incidents, in violation of *Hubby*.

United States v. Broadway, 477 F.2d 991 (5th Cir. 1973), cited in the recent case of *United States v. Brown*, 548 F.2d

1194 (5th Cir. 1977), presents an illuminating discussion of the problem:

> "The reported cases note dangers in the admission of such other crime evidence to prove elements of the crime charged. Such evidence may severely prejudice the defendant 'by the confusion of issues, or the likelihood that the jury may illogically assume that since the defendant has committed one offense he may well, for that reason alone be guilty of another . . .' *Labiosa v. Government of Canal Zone*, 5 Cir. 1952, 198 F.2d 282, 284-285. The strong possibility of prejudice inherent in the use of such evidence has led courts to restrict use of evidence of other crimes [*See, e.g., Drew v. United States*, 331 F.2d 85 (D.C. Cir. 1964)].
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> * * *
>
> "[It has been held that] in cases where intent or guilty knowledge is sought to be proved by evidence of similar offenses that the proof of other related offenses '. . . be plain, clear, and conclusive, and evidence of a vague and uncertain character is not admissible.' *United States v. Spica*, 8 Cir. 1969, 413 F.2d 129, 131; *Kraft v. United States*, 8 Cir. 1956, 238 F.2d 794; *Gart v. United States*, 8 Cir. 1923, 294 F.66; *Paris v. United States*, 8 Cir. 1919, 260 F. 529" (477 F.2d at 994, 995).

There is no way that it can be said that the proof of the January 1972 and December 1972 offenses was plain, clear, and conclusive when this testimony came from the mouth of a heroin addict (Saytes) and a witness whom one can now speculate was cooperating with the prosecution (Stutler). The government reasoned that its weak case against petitioner would be strengthened by confusing and prejudicial collateral evidence. Regrettably, its reasoning was correct. With this damning evidence prowling the jury room, it was impossible for the jury's impartiality to survive, and a guilty verdict was inevitable.

The prejudicial proof of subsequent similar acts of smuggling is but one more indication of the government's overkill in this

prosecution of a man against whom it had no evidence of wrongdoing. The United States Attorney, driving headlong for a conviction, in one last desperate move and in pitiful panic, attempted to run petitioner down with this outrageous evidence designed to stampede the jury into a guilty verdict. Once this cutting evidence was placed in the hands of the jury, petitioner's presumption of innocence hemorrhaged and he was doomed.

The terror of this type of proof lies in its unpredictability. There is no way a defendant can prepare for this evidence. An indictment advises a defendant of the charge he must meet but he cannot arm himself against this form of inflammatory evidence.

A reinforcement of the doctrine proscribing the use of evidence of subsequent similar acts is badly needed for prosecutors around the country are bound to resort to this tactic of convicting defendants of things for which they have not been charged. This problem of prosecutors proving uncharged criminal acts is a continuing and growing source of controversy in federal courts throughout the country. It is imperative that some limits be placed on those procedures or otherwise no defendant in a criminal case will be safe. The only manner in which the rule of law can be revitalized is for this Court to grant the petition for certiorari.

CONCLUSION

For all these reasons, the Court should grant this petition for certiorari.

May, 1977

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APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Elliot LASKY, Defendant-Appellant.

Nos. 75-2860, 76-2425.

United States Court of Appeals,
Ninth Circuit.

Jan. 5, 1977

Rehearing Denied March 8, 1977.

Appeal was taken from a judgment of conviction for importing and conspiracy to import cocaine entered by United States District Court for the Southern District of California, William B. Enright, J., and from an order denying defendant's motion for new trial. The appeals were consolidated and the Court of Appeals held that cross-examination question asked of prosecution witness as to number of trips he made to import cocaine were vague and equivocal so that witness' answer that he made two trips to import cocaine was not improper answer even though witness had, in fact, made two trips to import marijuana in addition to two cocaine trips; and that evidence of witness' trips to purchase marijuana was not sufficient to create reasonable doubt where testimony of witness, who did not participate in charged drug conspiracy but participated in subsequent drug transactions with defendant, was not admitted for purpose of establishing defendant's guilt but only for purpose of demonstrating defendant's intent and knowledge;

thus, Government's failure to disclose such evidence pursuant to general discovery request did not require reversal.

Affirmed.

1. Criminal Law 1166.14

Even though defendant was absent from in camera inquiry concerning alleged prejudicial communication with juror, where no prejudicial communication took place and it was Government who moved to excuse juror and defense counsel who opposed Government's motion, defendant's absence from proceeding was, at most, harmless error.

2. Criminal Law 1166.14

Even though defendant was not present at evidentiary in camera proceeding, where his absence did not result in prejudice, his absence did not constitute reversible error. Fed.Rules Crim.Proc. rule 16(d)(1), 18 U.S.C.A.

3. Criminal Law 374

Record did not support defendant's assertion that his decision to testify on direct examination concerning subsequent similar acts was result of compulsion rather than strategic trial decision.

4. Criminal Law 371(1), 673(5)

Evidence of similar acts was admissible to show defendant's intent and state of mind and admission of such evidence did not result in prejudice to fair trial, especially in light of trial court's instruction for jury not to consider such evidence unless other evidence, standing alone, established defendant's guilt beyond reasonable doubt.

5. Witnesses 280

Cross-examination questions asked prosecution witness as to number of trips he made to import cocaine were vague and equivocal so that witness' testimony that he made two trips to import cocaine was not improper answer even though witness

had, in fact, made two trips to import marijuana and two cocaine trips.

6. Criminal Law 627.8(3)

General discovery request for all exculpatory material places Government in no better position than if no request was made; with broad request, any duty to respond must derive from obviously exculpatory character of certain evidence in hands of prosecutor.

7. Criminal Law 627.7(4)

Where defendant makes broad, general discovery request for all exculpatory material, proper standard of materiality for omitted evidence, for purpose of determining if there was an illegal suppression, is whether omitted evidence creates reasonable doubt which did not otherwise exist.

8. Criminal Law 1166(1)

Evidence that prosecution witness who testified he had made two trips to import cocaine had, in fact, also made two other trips to purchase marijuana was not sufficient to create reasonable doubt where testimony of witness, who did not participate in charged drug conspiracy but participated in subsequent drug transactions with defendant, was not admitted for purpose of establishing defendant's guilt of charged transaction but only for purpose of demonstrating defendant's intent and knowledge; thus, Government's failure to disclose such evidence pursuant to defendant's general discovery request for all exculpatory information did not require reversal. U.S.C.A. Const. Amend. 5; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§1002, 1010, 1013, 21 U.S.C.A. §§952, 960, 963.

Philip Scott Ryan, San Francisco, Cal., for defendant-appellant.

Harry D. Steward, U.S. Atty., San Diego, Cal., for plaintiff-appellee.

Before BROWNING, Chief Judge, LAY,* Circuit Judge, and WATERS,** District Judge.

PER CURIAM:

Elliot Lasky appeals his conviction for importing and conspiracy to import cocaine in violation of 21 U.S.C. §§952, 960 and 963. After a mistrial was declared because of a hung jury, Lasky was retried and convicted on both counts. He was sentenced to two concurrent seven-year terms with a ten-year special parole term. Lasky filed this appeal, and subsequently moved for a new trial on the ground of newly discovered evidence. This court remanded the case to the district court, the Honorable William E. Enright, to review the new evidence. After a hearing Judge Enright declined to entertain the motion for new trial, and the defendant appealed that ruling. Since both appeals present the same fundamental issue, they have been consolidated.

[1-4] The basic issue on appeal is the defendant's contention that the government suppressed information about a government witness which was favorable to the defense in violation of the principles announced in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 463, 31 L.Ed.2d 104 (1972).[1]

*The Honorable Donald P. Lay, United States Circuit Judge, Eighth Circuit, sitting by designation.

**The Honorable Laughlin E. Waters, United States District Judge, Central District of California, sitting by designation.

I.

The conspiracy charged in the indictment encompassed a time period from September 1971 to December 1971. The government's case established that the 1971 conspiracy was a joint effort between Lasky and Sam Mangiameli. The evidence showed that Lasky supplied part of the financing and a list of cocaine contacts in Colombia, South America. Beyond supplying the list of contacts and the financial support, Lasky played no physical part in the purchase and importation of the cocaine. The government's proof proceeded on the theory that Lasky employed Thomas Saytes as his agent. Lasky gave Saytes the purchase money and the list of contacts. Saytes then met

1. The defendant has raised several other issues. Although we do not discuss them in detail, we have thoroughly examined them and found no merit to them. The defendant's additional claims of error were on the following grounds:

(1) He was absent from an *in camera* inquiry concerning an alleged prejudicial communication with a juror. Although defendant was not present, the record discloses that no prejudicial communication took place. The record also discloses that it was the government who moved to excuse the juror and that the defendant's counsel opposed the government's motion. Since there was no prejudice, the defendants' absence from these proceedings was, at best, harmless error. *See United States v. Doe*, 513 F.2d 709, 710 n. 1 (1st Cir. 1975); *United States v. Reynolds*, 489 F.2d 4, 8 (6th Cir. 1973); and *United States v. Larkin*, 417 F.2d 617, 618-19 (1st Cir. 1969). We similarly reject for lack of prejudice defendant's claim that he was entitled to be present at the evidentiary *in camera* proceeding held pursuant to Fed.R. Crim.P. 16(d)(1).

(2) There was no criminal prohibition against importing or conspiracy to import cocaine during the period charged in the indictment, because the schedules of controlled substances were not

Footnote continued on next page

Mangiameli and his wife, Claudia, in Colombia where they purchased the cocaine from a source on Lasky's list. The cocaine was then fitted on the bodies of Susan Chase and Claudia Mangiameli (nee Edman), who then flew to Tijuana, Mexico. In Tijuana the cocaine was packed in the spare tire of Susan Chase's automobile which was driven across the border by Ken Boston. At the border the car was searched and the cocaine discovered. According to the government's evidence, that same day in response to Saytes' telephone call, Lasky came to Sam Mangiameli's house in Los Angeles to discuss the arrest with Saytes, Sam and Claudia Mangiameli and Helen Smith.

The government's principal witnesses were Thomas Saytes and Helen Smith. Lasky had met with Claudia Mangiameli in

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republished in compliance with 21 U.S.C. §812. This claim lacks merit. *See United States v. Infelice*, 506 F.2d 1358 (7th Cir. 1974); and *United States v. Nocar*, 497 F.2d 719 (7th Cir. 1974).

(3) His decision to testify on direct examination concerning subsequent similar acts was the result of compulsion, rather than a strategic trial decision. The record and case law refute this claim. *See Garner v. United States*, 424 U.S. 648, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1976); *United States v. Murray*, 492 F.2d 178, 197 (9th Cir. 1973); and *Shorter v. United States*, 412 F.2d 428, 431 (9th Cir. 1969). *See also Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 2244 n. 7, 49 L.Ed.2d 91 (1976); *Id.* at 2249-50 n. 8 (Stevens, J., dissenting); *Brown v. United States*, 356 U.S. 148, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958); and *Fitzpatrick v. United States*, 178 U.S. 304, 20 S.Ct. 944, 44 L.Ed. 1078 (1900).

(4) The admission into evidence of similar acts was prejudicial error. We disagree. This evidence was clearly admissible to show the defendant's intent and state of mind. There was no prejudice to a fair trial. In addition the district court instructed the jury not to consider this evidence unless other evidence, standing alone, established the defendant's guilt beyond a reasonable doubt. *See United States v. Marshall*, 526 F.2d 1349, 1361 (9th Cir. 1975); and *United States v. Lewis*, 423 F.2d 457, 459 (8th Cir. 1970).

Helen Smith's apartment to discuss importing Colombian cocaine, and Smith was present at the Los Angeles meeting.

Tom Saytes testified about his arrangement with Lasky to be Lasky's agent, i.e., that Lasky gave him the list of Colombia cocaine contacts and the purchase money. Saytes also testified about the purchase and importation of the cocaine, and the Los Angeles meeting.

The government also presented evidence of three subsequent similar transactions involving Lasky. A January 1972 transaction was related only by Tom Saytes. On this occasion Lasky personally made the arrangements for the couriers. After Lasky gave him the money, Saytes testified, he flew to Colombia, made the purchase and supplied the cocaine to the couriers.

The May 1972 transaction involved Lasky, Saytes and Helen Smith. Lasky provided the financing, Saytes made the purchase, and Smith was the courier. Smith was arrested at a New York airport, and subsequently all three pleaded guilty and were convicted.

The third similar transaction occurred in December 1972. David Stutler testified that he flew what he believed to be a trial cocaine run to Mexico for Fred Chase. Later, at a dinner party, he discovered it was not a "dry" run but a "successful" run. Stutler also testified that at the dinner party Lasky gave Fred Chase an envelope from which Chase later paid Stutler for piloting the aircraft.

Lasky admitted his involvement in the May 1972 transaction, but denied any involvement in the January 1972 or December 1972 transactions. In his own defense Lasky testified that he met with Claudia Mangiameli to purchase cocaine for personal use and not to discuss importing cocaine. He asserted that he was not involved in the conspiracy and that Saytes was acting independently and not as his agent. Lasky testified that the

names he gave Saytes were social contacts. He explained his attendance at the Los Angeles meeting as a response to a friend's (Saytes) plea for help.

The other defense witnesses' testimony supported Lasky's and undermined Saytes' credibility. They testified that Saytes' reputation for truth and veracity was poor, that he was a heroin addict, and that Saytes had a misunderstanding with Lasky because of Claudia Mangiameli's comment that Lasky considered Saytes "a mere lackey." They testified that when confronted by Saytes, Lasky denied making the statement and accused Claudia of a fabrication. Saytes testified that the statement upset him as it was Lasky's plan to portray him as Lasky's partner so that Saytes could have some influence over Sam Mangiameli.

II.

The defendant claims error in the trial proceedings on the ground that the government suppressed information about David Stutler, a government witness, which prevented the defense from adequately cross-examining him. The suppressed evidence reveals, the defendant asserts, that Stutler committed perjury, was deeply involved in the importation of illegal drugs and was testifying in return for the government's promises of nonprosecution and sentence modification. The defendant asserts that the suppression of this evidence denied him the right to a fair trial guaranteed by the due process clause of the Fifth Amendment.

David Stutler was not called as a witness at the first trial, but was called as a government witness in the second trial. He testified about the December 1972 "trial run" incident and the dinner party at which Lasky gave Fred Chase an envelope from which Chase later paid Stutler for piloting the aircraft. Stutler also testified that he was serving a prison sentence for importing

cocaine. On cross-examination Lasky's attorney questioned Stutler about his arrest and conviction:

> Q. And the trial in which Mr. Coffin asked you about was a trial where you attempted to smuggle twenty-two and a half pounds of cocaine into the United States. Is that right?
>
> A. That's right.
>
> Q. And you were arrested in — on an island near Colombia. Is that right?
>
> A. Yes, that is right.
>
> Q. And as a result of that arrest and the cocaine that was found in your airplane, you went to trial here in San Diego. Is that right?
>
> A. Yes.
>
> Q. How many other trips have you made besides that one?
>
> A. The one that I am presently incarcerated on?
>
> Q. Yes.
>
> A. The one in question here, in 1972.
>
> Q. So you only made two trips?
>
> A. Yes.

[5] The Assistant United States Attorney knew at the time of Stutler's testimony that Stutler had made two trips to import marijuana in addition to the two cocaine trips. The government brought this information to the attention of the court and Lasky's attorney *after* the jury had retired. The defendant complained that the government had knowingly used perjured testimony, but the district court found that the questions were vague and equivocal and that taken in context, "Stutler could, in all truth and honesty, answer the questions the way he did." We agree.

As an additional basis for error the defendant contends that the government suppressed information about David Stutler despite discovery requests for the information. The record demonstrates that the defendant's discovery requests did not give "the prosecutor notice of exactly what the defense desired." *United States v. Agurs*, —— U.S. ——, 96 S.Ct. 2392, 2398-99, 49 L.Ed.2d 342 (1976). Before the first trial Lasky's counsel requested all probation reports, presentence interviews and reports for 14 individuals including David Stutler. Subsequently Lasky's counsel requested all "*Brady* material" and "*Giglio* material."[2] In seeking this information the defendant was not willing to rely on the government's judgment and requested that the government's complete file be produced for examination by the court and defense counsel.

[6, 7] Such a general request places the government in no better position than if no request had been made. With broad requests any duty to respond "must derive from the obviously exculpatory character of the certain evidence in the hands of the prosecutor." *United States v. Agurs, supra*, 96 S.Ct. at 2399. Therefore the proper standard of materiality is whether the "omitted evidence creates a reasonable doubt that did not otherwise exist." *Id.* at 2401. Although cognizant of the admonition that in certain circumstances additional evidence of relatively minor importance might be sufficient to create a reasonable doubt, we find that in the context of the entire record, the additional evidence affecting David Stutler's credibility does not create a reasonable doubt.[3]

2. Lasky's February 11, 1975, motion requested:

> Order requiring delivery to the defendant of all evidence favorable to him under the authority of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, including all information regarding police records, arrests, convictions, and any deals, promises or communications with Government witnesses regarding benefits they may receive, or have already received, for testifying against defendant, pursuant to *Giglio v. U.S.*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104.

In support of this motion the defendant filed a memorandum which states his discovery request in greater detail, but the request could still be accurately characterized as requesting "all *Brady* and *Giglio* material."

[8] David Stutler was not a participant in the 1971 conspiracy. His testimony did not directly link Lasky with the 1971 conspiracy, nor did his testimony corroborate any testimony linking Lasky with the 1971 conspiracy. Stutler testified only about the envelope incident at the December 1972 dinner party. This testimony was admitted only for the purpose of demonstrating Lasky's intent and knowledge. More importantly, the district court instructed the jury not to consider this testimony unless the other evidence, standing alone, established the defendant's guilt beyond a reasonable doubt. Our review of the record reveals that the other testimony, standing alone, clearly and convincingly established the defendant's guilt. Thus any further evidence[4] affecting David Stutler's credibility would not create a reasonable doubt that did not otherwise exist.

The judgment of conviction is affirmed.

3. In *Garrison v. Maggio*, 540 F.2d 1271 (5th Cir. 1976), the Fifth Circuit limited the materiality standard of *United States v. Agurs*, —— U.S. ——, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), to evidence concerning a substantive issue, and held that when the nondisclosed evidence concerns the credibility of a witness a new trial will be granted only if the defendant demonstrates that the evidence probably would have resulted in an acquittal. Since we find that the defendant has failed to satisfy the materiality standard of *United States v. Agurs*, we need not consider the propriety of a higher standard for impeachment evidence.

4. The defense was able to attack Stutler's credibility by showing his convictions for importing cocaine and that his sentence was still subject to modification and that a United States Attorney might make a favorable recommendation.

APPENDIX B

STATUTES INVOLVED

§952 Importation of controlled substances — Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions.

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter. . .

§960. Prohibited acts A — Unlawful acts.

(a) Any person who —

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,

(2) contrary to section 955 of this title, knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or

(3) contrary to section 959 of this title, manufactures or distributes a controlled substance, shall be punished as provided in subsection (b) of this section.

Penalties

(b) (1) In the case of a violation under subsection (a) of this section with respect to a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than fifteen years, or fined not more than $25,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than three years in addition to such term of imprisonment.

(2) In the case of a violation under subsection (a) of this section with respect to a controlled substance other than a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than five years, or be fined not more than $15,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall, in addition to such term of imprisonment, include (A) a special parole term of not less than two years if such controlled substance is in schedule I, II, III, or (B) a special parole term of not less than one year if such controlled substance is in schedule IV.

Special parole term

(c) A special parole term imposed under this section or section 962 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. The special term provided for in this section and in section 962 of this title is in addition to, and not in lieu of, any other parole provided for by law.

§963. Attempt and conspiracy.

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.